STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of LEONARD A. BLUE for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1981.	:	
In the Matter of the Petition of LEONARD A. BLUE AND HELEN J. BLUE (DEC'D) for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1978 through 1980.	:	DETERMINATION DTA NOS. 809244, 809245 AND 809246
In the Matter of the Petition of LEONARD A. BLUE AND HARRIET D. BLUE for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1982 through 1984.	:	

Petitioner Leonard A. Blue, 289 East Heritage Village, Southbury, Connecticut 06488, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1981.

Petitioners Leonard A. Blue and Helen J. Blue (Dec'd), 289 East Heritage Village, Southbury, Connecticut 06488, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 through 1980.

Petitioners Leonard A. Blue and Harriet D. Blue, 289 East Heritage Village, Southbury, Connecticut 06488, filed a petition for redetermination of a deficiency or for refund of personal

income tax under Article 22 of the Tax Law for the years 1982 through 1984.

On or about June 30, 1993 and July 1, 1993, respectively, petitioners by their representative, Kelley, Drye & Warren (Martin B. Miller, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due by October 18, 1993. The Division of Taxation submitted documents on March 31, 1993. The Division of Taxation submitted three answers on July 3, 1993. Petitioners submitted documents on July 12, 1993 and July 13, 1993. Petitioners submitted a brief on September 7, 1993. The Division of Taxation submitted a responding four-page letter brief on October 8, 1993. Petitioners submitted a three-page letter in lieu of a reply brief on October 22, 1993.[1] After due consideration of the record, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the retirement benefits received by petitioner Leonard A. Blue during the years in issue constituted a taxable annuity.

II. If the retirement benefits are determined to be taxable, whether, for tax years 1982, 1983 and 1984, petitioner Leonard A. Blue is entitled to a $20,000.00 reduction from Federal adjusted gross income under Tax Law § 612(c)(3-a).

FINDINGS OF FACT

Prior to the years in issue, petitioner Leonard A. Blue[2] was a partner in the law firm of

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[1]Petitioners were granted a one-week extension, until September 8, 1993, to submit their brief. The Division of Taxation was also granted a one-week extension, until October 8, 1993, to submit its answering brief. The due date of petitioners' reply brief was changed to October 23, 1993.

[2]Petitioner Leonard Blue (in order to correspond to his Federal filings) filed joint returns for 1978 through 1980 with his then wife, Helen J. Blue, since deceased; an individual return for 1981; and joint returns for 1982 through 1984 with his present wife, Harriet D. Blue. Separate petitions were filed for each of these periods. Mr. Blue is being referred to as "petitioner" herein

Kelley, Drye & Warren (the "Firm") which had offices within and without New York State. Mr. Blue was born on April 25, 1907 and was admitted to the New York State bar in 1932. He joined the Firm as an associate in September 1930 and became a partner of the Firm in January 1951. On January 1, 1977, Mr. Blue retired from the Firm, became a "life partner" pursuant to the Firm's written partnership agreement and, during the years at issue, was a nonresident of New York.

At the time Mr. Blue became a life partner, his capital account in the Firm was returned to him. Following his retirement, Mr. Blue did not perform any services for the Firm.

Under the Life Partner Payment Provisions, Article Eighth, of the Firm partnership agreement in effect as of January 1, 1978 (the terms of which were the same as parallel provisions in the Firm partnership agreement in effect as of petitioner's retirement on January 1, 1977), it was provided that a life partner would in general receive monthly each year from 1978 through 1982 one-twelfth of the greater of two annual amounts calculated for that year. Since petitioner's highest profit distribution percentage since January 1, 1970 was between 4.61 and 4.90, the two alternative amounts were (a) $36,000.00 plus $500.00 for each full 5% of the excess of the "Consumer Price Index for Urban Wage Earners and Clerical Workers - All Items" (the "CPI") for December of the preceding year over such index for 1972 (which was 127.3), and (b) $46,000.00. Life partner payments were subject to reduction in the event that (i) the total payments to life partners, as well as certain payments to the successor(s) in interest of deceased life partners, exceeded 20% of the Firm's profits for the year, or (ii) if paying the full annual payments to all life partners would result in certain partners being allocated Firm profits less than the highest unreduced life partner payment.[3]

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since the issues relate to certain payments received by Mr. Blue.

[3]Article Eighth of Articles of Partnership, made as of January 1, 1978, is set forth in Appendix A.

The Firm's partnership agreement was restated and reexecuted in 1979; however, the operative provisions concerning life partner payments were unchanged.[4]

The Firm's partnership agreement was amended and restated as of January 1, 1980 and included changes in the provisions relating to life partners. In the case of petitioner, the partnership agreement contained separate provisions for the years 1980 through 1982 and for years beginning with 1983. For 1980 through 1982, petitioner's annual life partner payments were fixed by the partnership agreement at $56,000.00. For the years 1983

and 1984, petitioner's annual life partner payments were fixed at 115% of the "Basic Annual Life Payment" determined under the Firm's partnership agreement. According to the partnership provisions, the Basic Annual Life Payment for each year was $50,000.00 times a fraction, the numerator of which was 222.4 (the amount of the Consumer Price Index for Urban Wage Earners and Clerical Workers -- All Items: New York, N.Y. -- Northeastern, N.J. [the "Index"] for December 1979) plus or minus 75% of the amount of the increase or decrease in the Index between December 1979 and the completed calendar month immediately preceding such year, and the denominator of which was 222.4, subject to the following limitations:

> "(1) The Basic Annual Life Partner Payment would not be reduced below $50,000;
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> "(2) The Basic Annual Life Partner Payment would not be increased for any year so as to cause the percentage of annual increase in Basic Annual Life Payment for that year to exceed the percentage of annual increase in Average Partner Net Earnings for the immediately preceding year; and
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> "(3) The Basic Annual Life Partner Payment would not be increased for any year so as to exceed 26% of Average Partner Net Earnings for the immediately preceding year."

The Firm partnership agreement, effective as of January 1, 1980, provided for potential reductions in a life partner payment if it would exceed 50% of average partner earnings for such

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[4]Article Eighth of Articles of Partnership, made as of January 1, 1979, is set forth in Appendix B.

year, or if aggregate life partner payments would exceed 15% of Firm earnings for such year.[5]

According to the affidavit of Thomas Carty, Director of Finance of the Firm, petitioner's 1980 through 1984 life partner payments were not limited by either of these limitations.

Petitioner Leonard Blue received the following life partner payments pursuant to the agreements for the years in issue:

Year	Life Partner Payment, as Fixed by the Firm's Partnership Agreement
1978	$46,000.00
1979	46,000.00
1980	56,000.00
1981	56,000.00
1982	56,000.00
1983	57,500.00
1984	57,500.00

In March 1985, the New York State Department of Taxation and Finance, Revenue Opportunity Division, contacted petitioner regarding his nonfiling of New York State nonresident income tax returns for the taxable years 1978 through 1983.

On December 12, 1985, petitioner filed New York State nonresident personal income tax returns (Form IT-203) for the taxable years 1978 through 1984, "paying the following amounts of tax and interest, while reserving all rights to claim a refund of the sums paid":

Year	Tax	Interest	Total
1978	$ 4,161.80	$ 3,419.77	$ 7,581.57
1979	3,632.00	2,597.84	6,229.84
1980	4,273.00	2,601.68	6,874.68
1981	3,768.00	1,721.48	5,489.48
1982	3,475.00	1,024.48	4,499.48
1983	3,333.00	605.10	3,938.10
1984	3,776.00	261.01	4,037.01
Total	$26,418.80	$12,231.36	$38,650.16

Accompanying the tax returns was a cover letter dated December 12, 1985 from Barry L. Salkin of the Firm. In this letter, Mr. Salkin outlined the historical background and legal

[5]Pertinent portions of partnership agreement as of January 1, 1980 are set forth in Appendix C along with the Tenth Supplement dated as of January 1, 1984.

position for petitioner's non-filing of the nonresident income tax returns. Mr. Salkin went on to state:

> "[H]owever, because of the hazards of litigation and certain proposed changes in the federal income tax law, taxpayer has determined to file New York State Nonresident Personal Income Tax Returns at this time, pending the outcome in the Pidot appeal. Of course, in the event that Pidot is reversed, and either the State Tax Commission elects not to appeal, or Pidot, as reversed by the Appellate Division, is affirmed by the Court of Appeals, or in the event of some other favorable development, taxpayer will file a Claim for Refund for each of the years in question."

Subsequent to the decision in Pidot v. State Tax Commn. (118 AD2d 915, 499 NYS2d 482, affd 69 NY2d 837, 513 NYS2d 965), petitioner, on December 4, 1987, filed amended returns for the taxable years 1978 through 1986, inclusive, treating the annuity payments as nontaxable pursuant to 20 NYCRR 131.4(d) and claiming refunds of all tax and interest paid with the original returns.

Sometime in early 1988, petitioner received a notice stating that the refund claim for 1984 would have to be processed by hand. By November 1, 1989, petitioner had received neither a refund nor a notice of disallowance of the claimed refunds. Petitioner submitted a request for a conciliation conference on November 1, 1989.

On June 8, 1990, petitioner received a "Notice of Disallowance" from the Audit Division, Central Income Tax Section ("Division"), which disallowed petitioner's claim for tax years 1978 through 1984. The reason for the disallowance was as follows:

> "[U]pon review of the information received from the partnership, Coopers and Lybrand [sic], concerning payments made to retired partners, it has been determined that the payments received by you from the partnership as a retired partner do not qualify as an annuity under Regulation Section 131.4(d) for the reason that a restrictive covenant condition exists. A qualified annuity entails the payment of a definite sum of money without contingency."

Conciliation conferences for tax years 1978 through 1980, 1981, and 1982 through 1984 were held on August 9, 1990. In three separate conciliation orders, dated November 23, 1990, the conferee denied the refund claims for the tax years 1978 through 1980, 1981, and 1982 through 1984.

Petitioner filed three separate petitions, dated February 19, 1991, which requested refund

of the nonresident personal income taxes paid for tax years 1978 through 1984, inclusive, plus interest.

Three answers, each dated July 3, 1991, were filed by the Division.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that he did not receive a "distributive share" of partnership income for the years in question which would generate any New York adjusted gross income under Tax Law former §§ 632(a)(1)(A) and 637(a)(1).

He argues that even if the Firm's payments to retired nonresident partners are potentially taxable, the life partner payments to him constituted a nontaxable annuity pursuant to 20 NYCRR former 131.4(d). He maintains that the provisions of the partnership agreements in effect in any given year met the requirements of 20 NYCRR former 131.4(d)(2).

Petitioner also contends that, in any event, for tax years 1982 through 1984 he is entitled to a $20,000.00 pension exclusion pursuant to Tax Law § 612(c)(3-a). He asserts that, for the years in question, "this provision was made effective to nonresidents under former Tax Law § 632(a)(2)" and that it would be applicable to him for the years 1982 through 1984 in the event his "Life Partner Payments were otherwise taxable and if former 20 NYCRR 131.4(d) were held applicable in whole or in part."

The Division argues that the payments received by petitioner for the years in question from the Firm were payments out of the law firm's profits and constituted income attributable to a business, trade, profession or occupation carried on in New York State which is subject to New York income tax.

The Division maintains that the retirement benefit payments received by petitioner were not annuities and were therefore taxable in New York because the payments lacked the uniformity required under 20 NYCRR former 131.4(d).

The Division argues that petitioners are time barred from amending their 1982, 1983 and 1984 tax returns because Tax Law § 687(a) required that the Tax Law § 612(c)(3-a) subtraction modification be made within three years of when the original returns were filed or two years

from the time the tax was paid. The Division maintains that since petitioners first claimed the $20,000.00 pension subtraction modification in their brief dated September 7, 1993, this additional claim for refund was not timely made and cannot be allowed.

Lastly, the Division asserts that petitioners have failed to meet their burden of proving by clear and convincing evidence that the disputed retirement benefits were not taxable in New York; that the disputed retirement benefits constituted nontaxable annuities; and that they are entitled to the Tax Law § 612(c)(3-a) subtraction modification. The Division requests that the petitions be denied and that the Division's denial of petitioners' claims for refund be sustained.

Petitioner, in his reply letter, argues that the decision in Kestenbaum v. State Tax Commn. (107 AD2d 955, 484 NYS2d 371) controls. He further argues that 20 NYCRR former 131.4(d) applies in this case.

Lastly, petitioner argues that, in any event, he is entitled to a $20,000.00 exclusion under Tax Law § 612(c)(3-a) for each year 1982, 1983 and 1984 and that this is an alternative ground for an existing timely claim and, as such, is not time barred under Tax Law § 687(a). He further argues that "the adjudications of this alternative ground requires no significant additional factual development and indeed involves the same central facts." Citing relevant case law, petitioner urges that it is proper for this additional ground for recovery of a part of the refund claim to be considered.

Petitioner requests that his petition for refund be granted in full.

CONCLUSIONS OF LAW

A. Tax Law former § 632(a)(1)(A) stated:

> "The New York adjusted gross income of a nonresident individual shall be the sum of the following:
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> "(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:
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> "(A) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-seven . . . ."

B. Tax Law former § 632(b)(1)(B) defined income "derived from or connected with New

York sources" to include income attributable to "a business, trade, profession or occupation carried on in this state."

C. Tax Law former § 632(b)(2) provided, in part, as follows:

> "Income from intangible personal property, including annuities . . . shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this state."

D. For the years at issue, 20 NYCRR former 131.4(d) read, in pertinent part, as follows:

> "(1) General. Where an individual formerly employed in New York State is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement benefit is not taxable for New York State personal income tax purposes if the individual receiving it is a nonresident and if it constitutes an annuity as defined in paragraph (2) of this subdivision. Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State . . . .
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> "(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements.
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> "(i) It must be paid in money only, not in securities of the employer or other property.
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> "(ii) It must be payable at regular intervals, at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin . . . .
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> "(iii) It must be payable:
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> "(a) at a rate which remains uniform during such life or period; or
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> "(b) at a rate which varies only with:
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> "(1) the fluctuation in the market value of the assets from which such benefits are payable;
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> "(2) the fluctuation in a specified and generally recognized cost-of-living index; or
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> "(3) the commencement of social security benefits; or
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> "(c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory. The term annuity starting date in the case of any contract or plan is the first day of the first period for which an amount is received as an annuity by the individual under the contract or plan.

> "(iv) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees."

E. Petitioner contends that he did not receive a "distributive share" of partnership income for the years in question which would generate any New York adjusted gross income under Tax Law former §§ 632(a)(1)(A) and 637(a)(1). He argues that his retirement payments were not a "distributive share" of partnership income because his partnership capital interest had been paid in full to him and he had no distributive share of income or loss pursuant to the Firm's partnership agreement at the time he received the payments in question. He maintains that he did not perform any services for the Firm after becoming a life partner. He further argues that the Pidot v. State Tax Commn. (supra) and Kestenbaum v. State Tax Commn. (supra) decisions are dispositive of this case.

The pertinent provisions of the partnership agreements applicable for the years in question are set forth in Appendices A, B and C. Review of these provisions reveals that petitioner did receive a "distributive share" of partnership income for the years in question.

The following identical language appears in Article Eighth of both the 1978 and 1979 partnership agreements:

> "[d]uring each year, a Life Partner shall have no Profit Distribution Percentage but there shall be paid to him out of the profits of the partnership each month until his death one-twelfth (1/12) of the annual amount provided for in paragraph (a) or (b), whichever is greater."

For tax years 1978 and 1979, life partner payments were paid out of the Firm's partnership profits. In addition, determination of a life partner's "stipulated annual amount" was based upon that particular life partner's highest profit distribution percentage since January 1, 1970.[6] For tax years 1980 through 1984, each life partner received an "annual life partner payment" in 12 equal installments, which was paid out of partnership

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[6]See Appendix A for pertinent portions of Article Eighth of the 1978 partnership agreement and Appendix B for pertinent portions of Article Eighth of the 1979 partnership agreement.

earnings.[7] Under the terms of the 1980 partnership agreement, a life partner's earnings allocation percentage was utilized in the calculation to determine the annual life partner payment which he received. Because the retirement payments paid to petitioner by the Firm were attributable to services he rendered in New York prior to his retirement in 1977, these payments constituted income attributable to a business, trade, profession or occupation carried on in New York State (see, Tax Law former § 632[a], [b][1][B]; 20 NYCRR former 131.4[d]).

Petitioners' reliance on the Kestenbaum v. State Tax Commn. (supra) decision is unwarranted. In Kestenbaum, the court determined that the pension of $250.00 per week for life did not constitute a distributive share of partnership income. The court looked at the partnership agreement for guidance in making its determination, and noted that the partnership agreement distributed 100% of the partnership income and losses among three individuals other than Mr. Kestenbaum. In the instant case, the applicable partnership agreements specifically identify that the life partner payments are to be paid out of the Firm's profits (for years 1979 and 1980) or the Firm's partnership earnings (for years 1980 through 1984).

Petitioners contend that Pidot v. State Tax Commn. (supra) involved closely comparable facts to their case and that based on the decision in Pidot, petitioners would be entitled to a full refund of all tax and interest. Pidot v. State Tax Commn. (supra) involved the question of whether the nontaxable annuity exemption of 20 NYCRR 131.4(d) applied to

partners as well as employees. Citing Kestenbaum v. State Tax Commn. (supra), the Pidot court determined that the provisions of 20 NYCRR 131.4(d) applied to partners and employees equally. That court reviewed the partnership agreement to determine whether the provisions of 20 NYCRR 131.4(d) had been met. The holding in Pidot v. State Tax Commn. (supra) does not state that retirement payments to nonresident retired partners of law firms are automatically nontaxable. Rather, it states that the partnership agreement must be reviewed to determine if

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[7]See Appendix C for pertinent portions of the 1980 partnership agreement.

the retirement payments constituted a nontaxable annuity under 20 NYCRR 131.4(d).

F. The Division contends that the provisions of the partnership agreements did not meet the requirements of 20 NYCRR former 131.4(d) because they "all contained language which allowed the retirement benefit payments to vary much more than anything envisioned by Regulation 131.4(d)." The Division maintains that the retirement payments paid to Mr. Blue did not meet the uniformity requirement of 20 NYCRR former 131.4(d)(2)(iii) and were not nontaxable annuities.

Petitioner contends that the provisions of the partnership agreements meet the requirements of 20 NYCRR former 131.4(d)(2) and that the life partner payments he received should be treated as nontaxable annuities under 20 NYCRR former 131.4(d).

In order to be treated as a nontaxable annuity, the retirement payments or pension must meet the requirements of 20 NYCRR former 131.4(d)(2) as stated in Conclusion of Law "D". The life partner payments paid to Mr. Blue under the various partnership agreements do not meet the requirements of a tax-exempt annuity. Article Eighth of both the 1978 and 1979 partnership agreements, applicable for tax years 1978 and 1979, do not satisfy the requirements of a tax-exempt annuity. The provisions of the 1978 and 1979 partnership agreements did provide for a potential increase in life partner payments based on a specified and generally recognized cost-of-living index. However, whether the adjustment would have been made depended upon what amounts the partners other than life partners received from profits. According to Article Eighth (b) (of both the 1978 and 1979 partnership agreements), the stipulated annual amounts payable to a life partner would be reduced proportionately to the extent they and "the minimum required payments to the successor or successors in interest of deceased Life Partners" exceed 20% of the profits of the partnership for that year. There would also be a reduction in all of the stipulated life partner amounts if a partner was to receive an amount less than the highest stipulated annual life partner amount.

Mr. Blue argues that because the life partner payments he received for the years 1980 through 1982 were uniformly fixed by the Firm's 1980 partnership agreement at $56,000.00,

they satisfied the rate requirement of 20 NYCRR former 131.4(d)(2)(iii)(b)(2). He also argues that, for the year 1983 and 1984, the provisions set permissible extremes which qualify under 20 NYCRR former 131.4(d)(2), since the amounts which the basic annual life partner payments could vary were between a fixed minimum of $50,000.00 and an amount based upon increases in the Consumer Price Index, limited by average partner net earnings for the previous year. Contrary to petitioner's arguments, the provisions of Article Five, Section 502 of the 1980 partnership agreement, applicable for tax years 1980 through 1984, do not satisfy the requirements of 20 NYCRR former 131.4(d)(2)(iii). According to Section 502(b), annual life partner payments would be reduced proportionately if annual life partner payments were to exceed 15% of partnership earnings in any fiscal year. In addition, no annual life partner payment in any fiscal year could exceed 50% of average partner net earnings in that fiscal year. For the years 1983 and 1984, under the terms of Section 502(c), the annual adjustment to the "basic annual life partner payment" could have been and sometimes was limited by "average partner net earnings" for the previous year.

In Norris v. State Tax Commn. (140 AD2d 876, 528 NYS2d 694), the issue was whether retirement benefits received pursuant to an agreement satisfied the requirements of 20 NYCRR former 131.4(d)(2)(iii). That court held that the retirement benefits received by Mr. Norris failed to satisfy the requirements of 20 NYCRR former 131.4(d)(2)(iii) because they were not uniform, but depended upon and varied with the former employer's profits for the year in question. The court stated:

> "[t]he subject regulation does not authorize a rate variation dependent upon the former employer's profits (see, 20 NYCRR 131.4[d][2][iii][a], [b])." (Norris v. State Tax Commn., supra, 528 NYS2d at 695.)

Just as in Norris, Mr. Blue's life partner payments throughout the period were not uniform; the annual amount each life partner received depended upon and varied with the law firm profits for the year or average partner net earnings for the previous year (see also, Matter of Walsh, Tax Appeals Tribunal, November 19, 1992, confirmed on other grounds ___ AD2d ___, March 24, 1994).

Since none of the Firm's partnership agreements contain language which satisfies the requirements of 20 NYCRR former 131.4(d)(2)(iii), Mr. Blue's life partner payments for the years 1979 through 1984 do not qualify as a nontaxable annuity.

The life partner payments received by Mr. Blue, a nonresident during the applicable period, constituted compensation for personal services which are taxable for New York State personal income tax purposes (see, Tax Law former § 632[a], [b][1][B]; 20 NYCRR former 131.4[d]).

G. Tax Law § 612 reads, in pertinent part:

> "(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.
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> * * *
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> "(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
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> * * *
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> "(3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, . . . to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship or (ii) from contributions to a retirement plan which are deductible for federal income tax purposes . . . ."

H. Petitioners argue that, in any event, for tax years 1982, 1983 and 1984, they are entitled to the $20,000.00 subtraction modification provided in Tax Law § 612(c)(3-a), which was made applicable to nonresidents by Tax Law former § 632(a)(2). Petitioners cite Matter of Norris (State Tax Commn., April 23, 1987 [TSB-H-87(117)I], confirmed on other grounds 140 AD2d 876, 528 NYS2d 694, supra), in which the former State Tax Commission ruled that certain payments to a retired employee, which were otherwise taxable, became eligible for the $20,000.00 subtraction modification when the employee reached age 59½. Petitioners maintain that since Mr. Blue was in excess of 59½ years of age during all relevant times, they are entitled to the $20,000.00 subtraction modification from their Federal adjusted gross income and thus from their New York adjusted gross income for each of the years 1982, 1983 and 1984. In

addition, petitioners argue that "this is not a new refund claim, but an alternative ground for an existing timely claim, and therefore is not time-barred under Tax Law § 687(a)." They maintain that "adjudication of this alternative ground requires no significant additional factual development and indeed involves the same central facts."

The Division argues that petitioners are time barred from amending their 1982, 1983 and 1984 tax returns because Tax Law § 687(a) requires that the Tax Law § 612(c)(3-a) subtraction modification be made within three years of when the original returns were filed or two years from the time the tax was paid. In the instant case, petitioners' original returns for 1982, 1983 and 1984 were filed and the taxes paid on December 12, 1985 and amended returns were filed on December 4, 1987. However, petitioners did not claim the $20,000.00 subtraction modification from Federal adjusted gross income on either their original or amended returns. The Division also maintains that petitioners are not entitled to the Tax Law § 612(c)(3-a) subtraction modification because "that section of the Tax Law does not include partners and partnerships among the specific groups mentioned therein."

The Tax Appeals Tribunal, in Matter of Rand (Tax Appeals Tribunal, May 10, 1990), stated that it is appropriate to look at Federal case law for guidance "as Tax Law section 687 is similar to section 6511 of the Internal Revenue Code and was intended to conform to federal law (Memorandum of State Department of Taxation and Finance, 1962 McKinney's Session Laws of NY, at 3536-3537)" (Matter of Rand, supra). The issue of whether a new ground of recovery may be introduced after the Federal statute of limitations for refunds has run by amending a pending timely filed claim was addressed in St. Joseph Lead Co. v. United States (299 F2d 348 [2d Cir 1962]). The U.S. Court of Appeals, Second Circuit, quoting its prior decision in Pink v. United States (105 F2d 183 [2d Cir 1939]), stated:

> "[W]hether a new ground for recovery may be introduced after the statute has run by amending a pending claim filed in time depends upon the facts which an investigation of the original claim would disclose. Where the facts upon which the amendment is based would necessarily have been ascertained by the commissioner in determining the merits of the original claim, the amendment is proper" (St. Joseph Lead Co. v. United States, supra, 299 F2d at 350 [2d Cir 1962]).

In the instant case, petitioners' request for the Tax Law § 612(c)(3-a) $20,000.00 subtraction

modification is an alternative ground for an existing claim. Petitioners asserted in their amended income tax returns that the retirement benefits Mr. Blue received were nontaxable on the basis of Pidot v. State Tax Commn. (supra), Tax Law former § 632(b) and 20 NYCRR former 131.4(d). The determination of whether the retirement benefits were taxable has a direct bearing on whether a Tax Law § 612(c)(3-a) subtraction modification would be necessary. The only additional fact which the Division would need to determine whether petitioners were entitled to the Tax Law § 612(c)(3-a) subtraction modification for tax years 1982, 1983 and 1984 was Mr. Blue's age.

The Division has failed to elaborate as to why petitioners are not entitled to the Tax Law § 612(c)(3-a) subtraction modification other than to state that "that section of the Tax Law does not include partners and partnerships among the specific groups mentioned therein." The Division's argument that Tax Law § 612(c)(3-a) does not apply to partners is without merit. Tax Law § 612(c)(3-a) was enacted by Laws of 1981, chapter 103. Review of the Bill Jacket, in particular the Governor's Memorandum filed with Assembly Bill number 4043-A, indicates that this section was enacted to place recipients of private and Federal pensions on a more equal footing with New York public pension recipients.

Tax Law § 612(c)(3-a) is similar in many respects to 20 NYCRR former 131.4(d). The decision in Pidot v. State Tax Commn. (supra) addressed the issue of whether the language of Tax Law former § 632(b)(2) would justify disparate tax treatment for employees and former partners who retained no interest in the partnership and did not share in partnership profits or losses. That court saw no merit to the Division's position that 20 NYCRR former 131.4(d) required disparate treatment of retired partners and other retired employees and applied the regulation to partners. Based upon my review of Tax Law § 612(c)(3-a) and its legislative history, I find that there is nothing in the language of the statute which would justify disparate tax treatment for former employees and former partners. Prior to his retirement, Mr. Blue had been employed by the Firm as a partner. He was a recipient of a private pension which was included in his Federal adjusted gross income. Since Mr. Blue was in excess of 59½ years of

age during the relevant period (1982 through 1984) and he was a nonresident whose retirement payments were included in his Federal adjusted gross income, he is entitled to the $20,000.00 subtraction modification of Tax Law § 612(c)(3-a) for tax years 1982, 1983 and 1984. Accordingly, for tax years 1982, 1983 and 1984, $20,000.00 of Mr. Blue's retirement benefits are to be subtracted from petitioners' Federal adjusted gross income in arriving at their New York adjusted gross income.

I. The petitions of Leonard A. Blue and Helen J. Blue (Dec'd) and Leonard A. Blue are denied, and the denial of Leonard A. Blue and Helen J. Blue (Dec'd) and Leonard A. Blue's claims for refund are sustained. The petition of Leonard A. Blue and Harriet D. Blue is granted to the extent indicated in Conclusion of Law "H"; Leonard A. Blue and Harriet D. Blue's claim for refund is granted to the extent indicated in Conclusion of Law "H"; and, in all other respects, the petition and claim for refund are denied.

DATED: Troy, New York
April 21, 1994

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

APPENDIX A

"Articles of Partnership, made as of January 1, 1978.

"ARTICLE EIGHTH

"Life Partner

* * *

"Messrs. Blue . . . became Life Partners on January 1, 1977 and shall be entitled to the amount provided in this Article Eighth.

"During each year, a Life Partner shall have no Profit Distribution Percentage but there shall be paid to him out of the profits of the partnership each month until his death one-twelfth (1/12) of the annual amount provided for in paragraph (a) or (b), whichever is greater.

(a)

"The stipulated amount determined from the following table after making the adjustment set forth in the paragraph following the table:

Highest Profit Distribution Percentage since January 1, 1970	Stipulated Annual Amount
4.0 or lower	$30,000
4.01 to 4.30	32,000
4.31 to 4.60	34,000
4.61 to 4.90	36,000
4.91 to 5.20	38,000
5.21 or higher	40,000

"For each of the years 1978 through 1982 the 'Adjustment Years'), if the 'Consumer Price Index for Urban Wage Earners and Clerical Workers - All Items' of the United States Bureau of Labor Statistics for the month of December preceding each such Adjustment Year exceeds by 5% or more such Index for the month of December, 1972, there will be added to the stipulated annual amount for the Adjustment Year following such December $500 for each full 5% of such excess. The implementation of such adjustments will be subject to reevaluation in the light of the amounts the partners who are not Life Partners receive from the profits of the partnership. Subsequent to the year 1982, and at three year intervals thereafter a review will be made of the aforesaid Index and the amounts the partners who are not Life Partners receive from the profits of the partnership to see whether additional adjustments would be equitable.

(b)

"The stipulated amount determined from the following table:

Highest Profit Distribution Percentage since January 1, 1970	Stipulated Annual Amount
4.0 or lower	$40,000
4.01 to 4.30	42,000
4.31 to 4.60	44,000
4.61 to 4.90	46,000

4.91 to 5.20	48,000
5.21 or higher	50,000

"The stipulated annual amounts, payable pursuant to paragraph (a) and (b), as otherwise adjusted for any year, shall be reduced proportionately to the extent they and the minimum required payments to the successor or successors in interest of deceased Life Partners pursuant to Article Ninth exceed twenty per cent (20%) of the profits of the partnership for such year. In addition, if in any year any partner who graduated from law school at least eight years prior to the beginning of such year and who is not a Life Partner nor in his Transition Period would receive (after giving effect to the preceding sentence but before giving effect to this sentence) from the profits of the partnership less than the highest level of stipulated annual amounts as otherwise adjusted which any Life Partner would receive for such year, the stipulated annual amounts payable to all Life Partners for such year shall be reduced as follows: the highest level of stipulated annual amounts as otherwise adjusted which any Life Partner would receive for such year shall be reduced algebraically to an amount equal to the smallest share of the partnership profits to be received after giving effect to this sentence by a partner who graduated from law school at least eight years prior to the beginning of such year and who is not a Life Partner nor in his Transition Period, and the remaining levels of stipulated annual amounts as otherwise adjusted shall be reduced in the same proportion. Any reductions required by the provisions of this paragraph may be made by reducing the payments to be made in the balance of the year involved or in any succeeding year, by reducing the payments to be made under Articles Seventh or Ninth, or by any combination thereof, and to the extent not so recovered shall be repayable to the partnership by the Life Partner or his personal representatives.

"Each Life Partner may continue to be as active in the practice of the partnership as he prefers to be and will be provided with office space and other services appropriate to the degree of his activity in the partnership's practice. All compensation for services and advice of a Life Partner shall continue to be partnership income in the same manner and to the same extent as prior to his becoming a Life Partner, and the provisions of Article Seventh with respect to Ancillary Income shall continue to apply to him.

* * *

"The provisions of this Article Eighth with respect to reduction of Profit Distribution Percentages during the Transition Period, the minimum amount payable to a partner during any year of his Transition Period, and the stipulated annual amounts and adjustments thereto for Life Partners shall govern the Profit Distribution List in force at any time, and such provisions of this Article Eighth shall become operative automatically. Each Profit Distribution List shall be subject to the provisions of this paragraph."

APPENDIX B

"Articles of Partnership, made as of January 1, 1979

"ARTICLE EIGHTH

"Life Partner

* * *

"Messrs. Blue . . . became Life Partners on January 1, 1977 and shall be entitled to the amount provided in this Article Eighth.

"During each year, a Life Partner shall have no Profit Distribution Percentage but there shall be paid to him out of the profits of the partnership each month until his death one-twelfth (1/12) of the annual amount provided for in paragraph (a) or (b), whichever is greater.

(a)

"The stipulated amount determined from the following table after making the adjustment set forth in the paragraph following the table:

Highest Profit Distribution Percentage since January 1, 1970	Stipulated Annual Amount
4.0 or lower	$30,000
4.01 to 4.30	32,000
4.31 to 4.60	34,000
4.61 to 4.90	36,000
4.91 to 5.20	38,000
5.21 or higher	40,000

"For each of the years 1979 through 1982 the 'Adjustment Years'), if the 'Consumer Price Index for Urban Wage Earners and Clerical Workers - All Items' of the United States Bureau of Labor Statistics for the month of December preceding each such Adjustment Year exceeds by 5% or more such Index for the month of December, 1972, there will be added to the stipulated annual amount for the Adjustment Year following such December $500 for each full 5% of such excess. The implementation of such adjustments will be subject to reevaluation in the light of the amounts the partners who are not Life Partners receive from the profits of the partnership. Subsequent to the year 1982, and at three year intervals thereafter a review will be made of the aforesaid Index and the amounts the partners who are not Life Partners receive from the profits of the partnership to see whether additional adjustments would be equitable.

(b)

"The stipulated amount determined from the following table:

Highest Profit Distribution Percentage since January 1, 1970	Stipulated Annual Amount
4.0 or lower	$40,000
4.01 to 4.30	42,000
4.31 to 4.60	44,000
4.61 to 4.90	46,000

4.91 to 5.20	48,000
5.21 or higher	50,000

"The stipulated annual amounts, payable pursuant to paragraph (a) and (b), as otherwise adjusted for any year, shall be reduced proportionately to the extent they and the minimum required payments to the successor or successors in interest of deceased Life Partners pursuant to Article Ninth exceed twenty per cent (20%) of the profits of the partnership for such year. In addition, if in any year any partner who graduated from law school at least eight years prior to the beginning of such year and who is not a Life Partner nor in his Transition Period would receive (after giving effect to the preceding sentence but before giving effect to this sentence) from the profits of the partnership less than the highest level of stipulated annual amounts as otherwise adjusted which any Life Partner would receive for such year, the stipulated annual amounts payable to all Life Partners for such year shall be reduced as follows: the highest level of stipulated annual amounts as otherwise adjusted which any Life Partner would receive for such year shall be reduced algebraically to an amount equal to the smallest share of the partnership profits to be received after giving effect to this sentence by a partner who graduated from law school at least eight years prior to the beginning of such year and who is not a Life Partner nor in his Transition Period, and the remaining levels of stipulated annual amounts as otherwise adjusted shall be reduced in the same proportion. Any reductions required by the provisions of this paragraph may be made by reducing the payments to be made in the balance of the year involved or in any succeeding year, by reducing the payments to be made under Articles Seventh or Ninth, or by any combination thereof, and to the extent not so recovered shall be repayable to the partnership by the Life Partner or his personal representatives.

"Each Life Partner may continue to be as active in the practice of the partnership as he prefers to be and will be provided with office space and other services appropriate to the degree of his activity in the partnership's practice. All compensation for services and advice of a Life Partner shall continue to be partnership income in the same manner and to the same extent as prior to his becoming a Life Partner, and the provisions of Article Seventh with respect to Ancillary Income shall continue to apply to him.

* * *

"The provisions of this Article Eighth with respect to reduction of Profit Distribution Percentages during the Transition Period, the minimum amount payable to a partner during any year of his Transition Period, and the stipulated annual amounts and adjustments thereto for Life Partners shall govern the Profit Distribution List in force at any time, and such provisions of this Article Eighth shall become operative automatically. Each Profit Distribution List shall be subject to the provisions of this paragraph."

APPENDIX C

"Agreement, as of January 1, 1980

* * *

"ARTICLE ONE

"DEFINITIONS AND PROVISIONS OF GENERAL APPLICATION

"Section 101. Definitions.

* * *

"'Annual Life Partner Payment' has the meaning specified in Section 502 of this Agreement.

"'Average Partner Allocation Percentage' means for any Fiscal Year the percentage, rounded to the nearest one-hundredth of one percent, which is obtained when one hundred is divided by the total number of Partners provided with Earnings Allocation Percentages in the Earnings Allocation List for that Fiscal Year prior to any modifications required by paragraph (c) of Section 304 of this Agreement.

"'Average Partner Net Earnings' means for any Fiscal Year the amount obtained when Partnership Net Earnings for that Fiscal Year is divided by the number of Partners other than Life Partners in that Fiscal Year. For purposes of determining the number of Partners other than Life Partners in a Fiscal Year, a Partner who was a Partner for part of a Fiscal Year shall be counted by a fraction equal to the fraction of the Fiscal Year during which the Partner was a Partner.

"'Basic Annual Life Partner Payment' has the meaning specified in Section 502 of this Agreement.

* * *

"'Life Partner' has the meaning specified in Article Five of this Agreement and includes Retired Life Partner.

* * *

"'Partnership Distributable Net Earnings' means Partnership Net Earnings remaining after payment of all minimum amounts and all stipulated amounts, if any, provided in an Earnings Allocation List.

"'Partnership Earnings' means the Partnership Revenues remaining after payment of all the Partnership's expenses and charitable contributions.

* * *

"'Partnership Net Earnings' means the Partnership Earnings remaining after payment of all amounts paid to Life Partners pursuant to Section 502 of this Agreement and with respect to Former Partners pursuant to Section 604 of this Agreement.

* * *

"'Retired Life Partner' has the meaning specified in Section 505 of this Agreement.

* * *

"ARTICLE FIVE

"LIFE PARTNERSHIP

"Section 501. Life Partners.

"Except as otherwise provided in this Agreement, each Partner shall become a Life Partner upon the expiration of the Partner's Transition Period. Each Life Partner may continue to be as active in the practice of the Partnership as the Life Partner prefers and shall be provided with office space and other services appropriate to the degree of that activity.

"Section 502. Payments to Life Partners.

"(a) The Partnership shall pay each Life Partner an Annual Life Partner Payment in twelve equal installments on the first business day of each calendar month.

"(b) The Annual Life Partner Payment for each Life Partner shall be a percentage of the then effective Basic Annual Life Partner Payment based upon the greatest percentage rounded to the nearest whole percent obtained when the Life Partner's Earnings Allocation Percentage for a Fiscal Year prior to any modifications required by paragraph (c) of Section 304 of this Agreement is divided by the Average Partner Allocation Percentage for that Fiscal Year in any one Fiscal Year from 1973 to 1979 inclusive or in at least three Fiscal Years after 1979 determined in accordance with the following table:

Greatest Percentage Obtained When A Partner's Earnings Allocation Percentage Is Divided By The Average Partner Allocation Percentage In Any One Fiscal Year From 1973 to 1979 Inclusive Or In At Least Three Fiscal Years After 1979		Percentage Of Basic Annual Life Partner Payment
Less than 110 Percent	-	100 Percent
110 Percent or More	-	105 Percent
120 Percent or More	-	110 Percent
130 Percent or More	-	115 Percent
140 Percent or More	-	120 Percent
150 Percent or More	-	125 Percent

"Annual Life Partner Payments shall be reduced proportionally so that the aggregate Annual Life Partner Payments in any Fiscal Year shall not exceed fifteen percent of Partnership Earnings for that Fiscal Year. In addition no Annual Life Partner Payment in any Fiscal Year shall exceed fifty percent of Average Partner Net Earnings in that Fiscal Year.

"(c) The Basic Annual Life Partner Payment for the Partnership's 1980, 1981 and 1982 Fiscal Years shall be $50,000. In each subsequent Fiscal Year the Basic Annual Life Partner Payment shall be the amount obtained when $50,000 is multiplied by a fraction of which the numerator is two hundred twenty two and four-tenths (222.4), which is the amount of the

'Consumer Price Index for Urban Wage Earners and Clerical Workers -- All Items: New York, N.Y. - Northeastern N.J.' of the United States Bureau of Labor Statistics for December 1979, plus or minus seventy five percent of the amount of the increase or decrease in the Index between December 1979 and the completed calendar month immediately preceding such subsequent Fiscal Year and the denominator is two hundred twenty two and four-tenths (222.4). Each annual adjustment to Basic Annual Life Payment pursuant to the previous sentence shall be subject to the following limitations:

"(1) Basic Annual Life Partner Payment shall not be reduced below $50,000;

"(2) Basic Annual Life Partner Payment shall not be increased for any Fiscal Year so as to cause the percentage of annual increase in Basic Annual Life Payment for that Fiscal Year to exceed the percentage of annual increase in Average Partner Net Earnings for the immediately preceding Fiscal Year; and

"(3) Basic Annual Life Partner Payment shall not be increased for any Fiscal Year so as to exceed twenty six percent (26%) of Average Partner Net Earnings for the immediately preceding Fiscal Year.

"Partners having an aggregate Earnings Allocation Percentage in excess of fifty may at any time determine that future increases to the Basic Annual Life Partner Payment pursuant to this paragraph (c) shall be further limited or eliminated entirely but that determination shall not reduce the amount of Basic Annual Life Partner Payment then in effect.

* * *

"Section 705. Messrs. Blue, et al..

"(a) The dates on which Messrs. Blue . . . became or will become Life Partners, his Annual Life Partner Payment for Fiscal Years 1980, 1981 and 1982, if applicable, and the percentage of Basic Annual Life Partner Payment which determines his Annual Life Partner Payment for Fiscal Years after 1982 are set forth in the following table:

Partner	Commencement of Life Partnersrhip January 1,	Annual Life Partner Payment in 1980, 1981 and 1982 as Applicable	Percentage of Basic Annual Life Partner Payment After 1982
Mr. . . .	1981	$50,000	100 Percent
Mr. Blue	1977	$56,000	115 Percent
Mr. . . .	1982	$50,000	100 Percent
Mr. . . .	1977	$54,000	110 Percent
Mr. . . .	1979	$50,000	100 Percent
Mr. . . .	1977	$50,000	100 Percent
Mr. . . .	1982	$60,000	125 Percent
Mr. . . .	1977	$60,000	125 Percent

* * *

"Tenth Supplement
Dated as of January 1, 1984
to the Agreement

Made as of January 1, 1980
forming Kelley Drye & Warren

* * *

"Section 4. Paragraph (a) of Section 502. Payments to Life Partners. shall be amended to state in its entirety:

'(a) The Partnership shall pay each Life Partner an Annual Life Partner Payment in twelve equal installments on the first business day of each calendar month. There shall be deducted from a Life Partner's Annual Life Partner Payment an amount equal to the Partner Retirement Plan Contributions by the Partnership on behalf of that Life Partner.'"